91-759

No. _____

In The

Supreme Court of the United States

October Term, 1991

RODNEY D. BALL, SR.; HARLESS V. BELCHER; JUNIOR F. BILLINGS; LYNN S. COMBS; RONALD J. DAVIS; THEODORE H. HARRIS; JERRY W. HOLMES; EDDIE D. KIRK; LARRY E. OLIVER; GERALD H. PROFFITT; DONALD R. ROLEN; FRANK E. ROOP, JR.; JESSIE F. STAMPER; ROGER L. TAYLOR; HORACE G. WHITE, JR.; JOHNNIE WILLIAMS; ROBERT E. THOMPSON; GENEVA A. THOMPSON; WILLIAM R. LEVITT; SHIRLEY LEVITT,

Plaintiffs-Appellants,

v.

JOY TECHNOLOGIES, INCORPORATED, formerly JOY MANUFACTURING COMPANY, a Pennsylvania Corporation,

Defendant-Appellee.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court sitting in diversity, and asked to determine a novel issue of state law, should hold that a state claim which has not been recognized by that jurisdiction's own courts, constitutes a settled question of law, which will not be disturbed absent the most compelling of circumstances.

2. Whether the lower court erred in holding that the law of West Virginia and Virginia would not permit recovery of damages for medical surveillance costs and emotional distress resulting from exposure to, and bodily absorption of, toxic chemicals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Plaintiffs Rodney D. Ball, *et al.*, petition the court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App. 1 - 8) is unreported. The opinion of the United States District Court for the Southern District of West Virginia is reported at 755 F.Supp. 1344.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit (App. 1 - 8) was entered on August 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 pursuant to this Court's Rule 13.1 allowing 90 days for filing a petition for a writ of certiorari.

STATEMENT OF THE CASE

These consolidated cases concern the question of how federal courts sitting in diversity should address novel issues of state law. The plaintiffs, who filed suit in the United States District Court for the Southern District of West Virginia, sought to determine their right, under West Virginia, and, in some cases Virginia law, to recover

compensation for medical surveillance costs and the emotional distress resulting from their exposure to, and absorption of, toxic chemicals.

The defendant in these cases, Joy Manufacturing Company (now Joy Technologies, Inc.), is a Pennsylvania Corporation which operated a number of facilities at which mining equipment motors using polychlorinated biphenyls (PCB's) were repaired and serviced.

Eighteen of the 20 plaintiffs in these consolidated cases have worked at either or both of the corporate defendant's facilities in Bluefield, West Virginia and Bluefield, Virginia. During their employment, as a result of the defendants' wrongful misconduct, they were occupationally (and in some cases, nonoccupationally) exposed to, and absorbed, various toxic chemicals, including polychlorinated biphenyls (PCBs), dioxins, furans, trichloroethylene (TCE), and 1, 1, 1 trichloroethane. These present and former employees seek to recover compensation for emotional distress, and for the costs of medical surveillance necessitated by their increased risk of developing cancer and other serious illnesses. They do *not* seek damages for increased risk, *per se*, or for any present illnesses. Their claims involve questions of first impression under the law of both West Virginia and Virginia.

Two of the 20 plaintiffs in these consolidated cases are spouses of past or present employees of the defendant corporation. Mrs. Levitts' claims are limited solely to loss of consortium. Mrs. Thompson, who was exposed to toxic chemicals brought home on her husband's body, clothing

and personal effects, seeks to recover for emotional distress and the cost of medical surveillance, as well as loss of consortium.

In August, 1990, the trial court informed the parties that it would grant defendants' motion for summary judgment. Shortly thereafter, plaintiffs filed a motion to certify questions of West Virginia law, and a motion to reconsider and/or amend judgment.

On September 18, 1990, the trial court entered a judgment order granting summary judgment in favor of the defendant, and dismissing plaintiffs' cases. In an associated memorandum order and opinion, the Court also denied plaintiffs' motion to certify questions of state law, and plaintiffs' motion to reconsider and/or amend judgment.

Plaintiffs' notice of appeal was filed on or about October 1, 1990. On November 19,1990, prior to any briefing or argument, plaintiffs filed a motion to certify questions of West Virginia law, together with a supporting memorandum. This motion was denied by an Order entered on December 12, 1990. On August 5, 1991, the Fourth Circuit entered an Order affirming the judgment of the trial court. Although the Fourth Circuit's unpublished opinion is not considered binding precedent under the Fourth Circuit's internal operating procedures (I.O.P.) 36.5, 36.6, it has, and will, affect decisions in the lower federal courts of that circuit. *See Watkins v. Big John Salvage Co.*, Civil Action No. 84-0145-C(s) (N.D.W.Va.) (denying motion to certify questions of state law in a case involving exposure to toxic chemicals).

REASONS FOR GRANTING THE PETITION

1. A Conflict Of Authority Has Developed Among The Federal Circuits Concerning The Proper Approach To Resolving Novel Issues Of State Law.

In recent years, the United States Court of Appeals for the Fourth Circuit has repeatedly held "that a state claim which has not been recognized by that jurisdiction's own courts constitutes a settled question of law which will not be disturbed by this court absent the most compelling of circumstances." *Tritle v. Crown Airways, Inc.*, 928 F.2d 81, 84 (4th Cir. 1990) (per curiam). *Accord Washington v. Union Carbide Corp.*, 870 F.2d 957, 962 (4th Cir. 1989). This very conservative approach to resolving state law questions of first impression has been employed even when a case has been filed in state court by the plaintiff, and removed to state court by the defendant. *See Tritle v. Crown Airways, Inc., supra.*

Other appellate courts, including the Ninth Circuit, however, have continued to recognize that "[f]ederal courts are not precluded from affording relief simply because neither the State Supreme Court nor the state legislature has enunciated a clear rule governing a particular type of controversy." *Paul v. Watchtower Bible & Tract Soc. of New York*, 819 F.2d 875, 879 (9th Cir. 1987). Federal courts may act even in the absence of "clearly established state law," and, where appropriate, "advance beyond existing state court precedent." *Id.*

In the case at bar, the trial court relied heavily on *Washington v. Union Carbide Corp.*, 870 F.2d 957 (4th Cir. 1989) and the then unpublished opinion in *Tritle v. Crown Airways, Inc.*, 928 F.2d 81 (4th Cir. 1990), *see* 755 F.Supp. at

1372-73, even though the Supreme Court of Appeals of West Virginia has earned a reputation as a very liberal, progressive court, *see Walker v. Griffith*, 626 F.Supp. 350, 353 (W.D.Va. 1986) (concluding that West Virginia courts would recognize a cause of action sounding in negligence against a tavern owner who continued to serve an intoxicated patron) (court noted that West Virginia had "been in the forefront of adapting the common law to meet today's needs" and had shown a "willingness . . . to expand the common law in the absence of specific legislative guidance"); *Blankenship v. General Motors Corp.*, 406 S.E.2d 781, 782 (W.Va. 1991) (court referred to its "wholesale updating of our tort law in the 1970's" and observed that it was obvious that "West Virginia's personal injury law has moved light years away from the doctrines applied in *McClung*" (a 1971 federal decision applying West Virginia law)), and the majority of jurisdictions addressing the issue have allowed the recovery of damages for medical surveillance costs. *See, e.g., In Re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829, 849-52 (3d Cir. 1990); *cert. denied sub nom, General Electric Co. v. Knight*, 111 S.Ct. 1584 (1991); *Barth v. Firestone Tire & Rubber Co.*, 673 F.Supp. 1466 (N.D.Cal. 1987); *Ayers v. Jackson Township*, 106 N.J. 557, 525 A.2d 287 (1987); *Gerardi v. Nuclear Utility Services, Inc.*, 149 Misc.2d 657, 566 N.Y.S.2d 1002 (1991).

The trial court's conservative assessment of West Virginia and Virginia law was upheld by the circuit court, which also cited to *Washington v. Union Carbide Corp.*, 870 F.2d 957 (4th Cir. 1989).

In *Salve Regina College v. Russell*, 499 U.S. ___, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991), this court addressed

the standard of review to be used by federal appellate courts in appeals from district court determinations of state law. These consolidated cases provide an opportunity to address an equally important question concerning the proper approach for district courts to employ in resolving unsettled questions of state law in diversity cases.

2. This Case Involves An Important Question Of Federal Law With Significant Implications For Forum Shopping And Federal Removal.

As the court observed in *Paul v. Watchtower Bible & Tract Soc. of New York*, 819 F.2d 857, 879 (9th Cir. 1987):

> Were we able to invoke only clearly established state law, litigants seeking to protect their rights in federal courts by availing themselves of our diversity jurisdiction would face an inhospitable forum for claims not identical to those resolved in prior cases. Equally important, a policy by the federal courts never to advance beyond existing state court precedent would vest in defendants the power to bar the successful adjudication of plaintiffs' claims in cases with novel issues; defendants could ensure a decision in their favor simply by removing the case to federal court. Congress, in providing for removal, certainly did not intend to provide such a weapon to defendants.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

RODNEY D. BALL, SR; HARLESS V. BELCHER; JUNIOR F. BILLINGS; LYNN S. COMBS; RONALD J. DAVIS; THEODORE H. HARRIS; JERRY W. HOLMES; EDDIE D. KIRK; LARRY E. OLIVER; GERALD H. PROFFITT; DONALD R. ROLEN; FRANK E. ROOP, JR.; JESSIE F. STAMPER; ROGER L. TAYLOR; HORACE G. WHITE, JR.; JOHNNIE WILLIAMS; ROBERT E. THOMPSON; GENEVA A. THOMPSON; WILLIAM R. LEVITT; SHIRLEY LEVITT, *Plaintiffs-Appellants,* v. JOY TECHNOLOGIES, INCORPORATED, formerly Joy Manufacturing Company, a Pennsylvania Corporation, *Defendant-Appellee.*	No. 90-1537

Appeal from the United States District Court
for the Southern District of West Virginia, at Bluefield.
Elizabeth V. Hallanan, District Judge.
(CA-87-268-1, CA-88-133-1, CA-88-1691-1)

Argued: May 8, 1991

Decided: August 5, 1991

Before WILKINSON, Circuit Judge, CHAPMAN, Senior Circuit Judge, and HILTON, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished opinion. Judge Hilton wrote the opinion, in which Judge Wilkinson and Senior Judge Chapman joined.

COUNSEL

ARGUED: James Anthony McKowen, HUNT & WILSON, Charleston, West Virginia, for Appellants. Dennis Charles Sauter, JACKSON & KELLY, Charleston, West Virginia, for Appellee. **ON BRIEF:** Robert L. Stewart, Jr., JACKSON & KELLY, Charleston, West Virginia, for Appellee.

OPINION

HILTON, District Judge:

The plaintiffs in this consolidated action are eighteen former employees of the defendant Joy Technologies, Inc. and two spouses of former employees. The plaintiffs allege that while employed at the defendant's corporate facilities in Bluefield, West Virginia, and Bluefield, Virginia, they were wrongfully exposed to and absorbed various toxic chemicals. The district court granted Joy's motion for summary judgment finding that the plaintiffs had not sustained any physical injury from their exposure

to toxic chemicals and having suffered no physical injury, the common law of West Virginia and Virginia would not allow them to recover damages for emotional distress or the costs of medical surveillance. The plaintiffs appealed. Finding no error in the granting of summary judgment in favor of Joy Technologies, we affirm.

I.

The defendant Joy Technologies, Inc. (hereinafter "defendant" or "Joy") began to manufacture and sell mining equipment in 1965. The mining equipment manufactured by Joy contained electric motors that used polychlorinated biphenyls (hereinafter "PCBs") as a coolant. In December of 1968, Joy purchased the Hart Electric building in Bluefield, West Virginia. Joy utilized the facility in Bluefield to repair and rebuild the motors used in the mining equipment it manufactured. The defendant used a vapor degreaser on the motors that contained trichloroethylene (hereinafter "TCE").

In 1975, Joy began construction on a new facility in Bluefield, Virginia. Joy transferred its manufacturing and repair operations to the new plant in 1988. Joy utilized a new vapor degreaser that contained 1,1,1 trichloromethane at the Bluefield, Virginia facility. The teardown and cleaning of motors continued at the Bluefield, West Virginia plant until September 1980. Joy's Bluefield, West Virginia facility was subsequently sold to Elwin Aliff.

The Bluefield, West Virginia plant was tested for PCB contamination in October, 1985. In January, 1986, the Environmental Protection Agency (hereinafter "EPA")

conducted an inspection of the West Virginia site. On February 20, 1986, the EPA issued a Superfund Cleanup order to Elwin Aliff and Lin-Elco Corporation of which Aliff was president. Aliff retained Remcor, Inc. to conduct a clean-up of the site. The clean-up effort generated publicity revealing that Joy employees had been exposed to toxic chemicals.

On March 17, 1987, sixteen former employees of Joy filed suit in the United States District Court for the Southern District of West Virginia (*Ball, et al. v. Joy Manufacturing Company*, Civil Action No. 1:87-0268). The *Ball* case was consolidated by court order on August 10, 1989, with *Thompson v. Joy Technologies, Inc.*, Civil Action No. 1:88-0133, and *Levitt v. Joy Technologies, Inc.*, Civil Action No. 1:88-1691. (The consolidated action included twenty plaintiffs, eighteen of whom were former employees of Joy at either the Bluefield, West Virginia, or Bluefield, Virginia site, while the other two plaintiffs were spouses of former employees. The plaintiffs alleged that while employed at Joy's corporate facilities in Bluefield, West Virginia, and Bluefield, Virginia, they were wrongfully exposed to and absorbed various toxic chemicals including PCBs, dioxins, furans, TCE, and 1,1,1 trichloromethane. Plaintiffs claimed that their exposure to such toxic chemicals constituted a physical injury and sought to recover damages for their resultant emotional distress and for the costs of medical surveillance allegedly necessitated by their exposure.

On September 18, 1990, the district court granted summary judgment for the defendant Joy Technologies. The district court found that the plaintiffs claimed their exposure to toxic chemicals was an injury in and of itself

and that none of the plaintiffs alleged that they sustained any physical injuries apart from their exposure. The district court concluded that the mere exposure to toxic chemicals did not constitute a physical injury. Having suffered no physical injury, the district court ruled that the common law of West Virginia and Virginia would not allow the plaintiffs to recover damages for emotional distress or the costs of medical surveillance.

II.

The plaintiffs claim that their exposure to toxic chemicals and the increased risk of developing cancer and other diseases resulting from such exposure constituted an injury that would entitle them to recover damages for emotional distress. The plaintiffs contend on appeal that the district court erred in holding that damages for emotional distress could not be recovered.

Courts in West Virginia and Virginia have recognized that damages for emotional distress may be recovered in three specific instances: (1) where the emotional disturbance results from an actual physical injury caused by the impact or occurrence of the tort; (2) where there is no initial impact or injury but physical injury thereafter results as the causal effect of the defendant's wrong; and (3) where there is no impact or physical injury but emotional disturbance results from an intentional or wanton wrongful act caused by the defendant. *Monteleone v. Cooperative Transit Co.*, 36 S.E.2d 475, 478 (W. Va. 1945); *Hughes v. Moore*, 197 S.E.2d 214, 219 (Va. 1973). Except for the intentional infliction of emotional distress, damages for

emotional distress may not be recovered under West Virginia or Virginia law absent a finding of physical injury. *Monteleone*, 36 S.E.2d at 478; *Hughes*, 197 S.E.2d at 219.

The mere exposure of the plaintiffs to toxic chemicals does not provide the requisite physical injury to entitle the plaintiffs to recover for their emotional distress. Numerous courts have held that exposure to hazardous substances does not constitute a physical injury. *See Adams v. Johns-Manville Sales Corp.*, 783 F.2d 589, 593 (5th Cir. 1986) (rejecting plaintiff's claim for mental distress damages under Louisiana law because he failed to establish that he sustained an injury from his exposure to asbestos products); *Plummer v. Abbott Laboratories*, 568 F. Supp. 920 (D.R.I. 1983) (finding that plaintiffs' ingestion of diethylstilbestrol that allegedly increased the risk of contracting cancer did not *per se* constitute a physical injury under Rhode Island law); *Sypert v. United States*, 559 F. Supp. 546 (D.D.C. 1983) (concluding that because the plaintiff had suffered no physical injury from his exposure to tubercle bacilli, he could not recover mental distress damages under Virginia law); *Eagle-Picher Industries, Inc. v. Cox*, 481 S.2d 517 (Fla. Dist. Ct. App. 1985) (holding that Florida law did not recognize inhalation of asbestos as a physical injury); *Payton v. Abbott Laboratories*, 437 N.E.2d 171 (Mass. 1982) (plaintiff's in utero exposure to diethylstilbestrol was not a physical injury or harm under Massachusetts law).

Plaintiff urges this court to expand the law of torts in West Virginia and Virginia and recognize exposure to toxic substances as a physical injury. The *Erie* doctrine permits federal courts "to rule upon state law as it presently exists and not to surmise or suggest its expansion."

Washington v. Union Carbide Corp., 870 F.2d 957, 962 (4th Cir. 1989). Because the law of West Virginia and Virginia requires physical injury before a plaintiff may recover damages for emotional distress, the district court was correct in concluding that the exposure of the plaintiffs to toxic chemicals did not constitute an injury that would entitle them to recover damages for emotional distress.

III.

The plaintiffs also claim that the district court erred in holding the costs of medical surveillance could not be recovered. In their claim for medical surveillance costs, plaintiffs seek to recover the costs of periodic medical examinations designed to monitor their health and facilitate early detection of disease caused by their exposure to toxic chemicals.

A claim for medical surveillance costs is simply a claim for future damages. Plaintiff correctly points out that the law of West Virginia allows the recovery of the reasonable value of future medical expenses necessitated by the defendant's wrong. *See, e.g., Jordan v. Bero*, 210 S.E.2d 618, 637 (W. Va. 1974). However, such relief is only available where a plaintiff has sustained a physical injury that was proximately caused by the defendant. *Jordan*, 210 S.E.2d at 637; *Long v. City of Weirton*, 214 S.E.2d 832, 860 (W. Va. 1975); *accord Hailes v. Gonzales*, 151 S.E.2d 388, 390 (Va. 1966). Plaintiffs have not demonstrated that they are suffering from a present, physical injury that would entitle them to recover medical surveillance costs under West Virginia or Virginia law.

Plaintiffs have proffered several public policy arguments for allowing individuals to recover the costs of medical monitoring where there has been no manifestation of physical injury. We agree with the district court that such considerations are better left to the respective legislatures and highest courts of West Virginia and Virginia.

For the foregoing reasons, the disposition of the case below is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-1537

RODNEY D. BALL, SR., ET AL.,

Appellants,

versus

JOY TECHNOLOGIES, INC.,

Appellee.

ORDER

We have considered the motion of appellants to certify certain questions of law to the Supreme Court of Appeals of West Virginia and the response thereto. We are of opinion the motion should be denied.

It is accordingly ADJUDGED and ORDERED that the said motion to certify certain questions of law to the Supreme Court of Appeals of West Virginia shall be, and the same hereby is, denied.

With the concurrences of Judge Murnaghan and Judge Wilkinson.

/s/ H. E. Widener, Jr.
For the Court

A True Copy: Teste:

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IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
AT BLUEFIELD

RODNEY D. BALL, SR., et al.,

Plaintiffs,

v.

JOY MANUFACTURING CO.,
a Pennsylvania Corporation,

Defendant.

Civil Action
No. 1:87-0268

and

ROBERT E. THOMPSON and
GENEVA ANN THOMPSON,
Plaintiffs,

v.

JOY TECHNOLOGIES, INC.
(formerly Joy Manufacturing
Company), a Pennsylvania
Corporation,

Defendant.

Civil Action
No. 1:88-0133

and

WILLIAM R. LEVITT and
SHIRLEY LEVITT,

Plaintiffs,

v.

JOY TECHNOLOGIES, INC., a
Delaware Corporation, (formerly
Joy Manufacturing Company, a
Pennsylvania Corporation),

Defendant.

Civil Action
No. 1:88-1691

JUDGMENT ORDER

In conformity with the Order entered herein of even date herewith, it is ORDERED and ADJUDGED that judgment shall be entered in favor of the Defendant and against the Plaintiffs.

The Clerk is directed to remove this action from the docket of this Court and to mail a certified copy of this Order to counsel of record.

IT IS SO ORDERED this 18th day of September, 1990.

ENTER:

/s/ Elizabeth V. Hallanan
ELIZABETH V. HALLANAN
United States District Judge

91-759

(2)

In The

Supreme Court of the United States

October Term, 1991

RODNEY D. BALL, SR.; HARLESS V. BELCHER; JUNIOR F. BILLINGS; LYNN S. COMBS; RONALD J. DAVIS; THEODORE H. HARRIS; JERRY W. HOLMES; EDDIE D. KIRK; LARRY E. OLIVER; GERALD H. PROFFIT; DONALD R. ROLEN; FRANK E. ROOP, JR.; JESSIE F. STAMPER; ROGER L. TAYLOR; HORACE G. WHITE, JR.; JOHNNIE WILLIAMS; ROBERT E. THOMPSON; GENEVA A. THOMPSON; WILLIAM R. LEVITT; SHIRLEY LEVITT,

Petitioners,

v.

JOY TECHNOLOGIES INC., formerly Joy Manufacturing Company, a Pennsylvania Corporation,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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I. QUESTION PRESENTED

1. Whether West Virginia and Virginia Law, Which Require Physical Injury to Support a Claim for Emotional Distress and Future Medical Expenses, Mandated Summary Judgment, Given the Plaintiffs' Lack of Physical Injury.

II. TABLE OF CONTENTS

III. TABLE OF AUTHORITIES

Page

Statutes

Cases

III. TABLE OF AUTHORITIES – Continued

IV. STATEMENT OF THE CASE

The plaintiffs have filed a petition for certiorari from a judgment of the United States Court of Appeals for the Fourth Circuit dated August 5, 1991, which affirmed a judgment of the United States District Court for the Southern District of West Virginia at Bluefield, West Virginia, in favor of the defendant Joy Technologies Inc.,[1] entered on September 18, 1990.

In their petition for certiorari, the plaintiffs describe only certain limited facts. The plaintiffs intimate that this case is of grand importance to plaintiffs who are disadvantaged by finding themselves trapped in federal court. If this is so, then these plaintiffs created their own disadvantage. These consolidated actions were originally filed by the plaintiffs in the United States District Court for the Southern District of West Virginia at Bluefield, West Virginia. Throughout the litigation, the plaintiffs clung to their chosen forum in federal district court and only sought to abandon it after the adverse summary judgment ruling. At oral argument on Joy's motion for summary judgment, the district court inquired as to whether either party favored certification. The court noted "It was obvious to the court at such time that neither of the parties favored this alternative. Rather, both parties felt confident of their respective positions and desired that

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[1] On June 26, 1987, Joy Manufacturing Co. was merged into Joy Technologies Inc., with Joy Technologies Inc., being the surviving corporation. Joy Technologies Inc. owns fifty percent of the stock of Joy MK Projects Co. Joy Technologies Inc. has no other partially owned subsidiaries.

this court reach a determination on the motion for summary judgment based on its interpretation of the present state of the law."[2]

For purposes of appeal, the plaintiffs portray this action as involving claims for emotional distress and medical monitoring allegedly caused by their exposure to chemicals as a result of Joy's "wrongful misconduct."[3] Plaintiffs fail to reveal that the eighteen employee or occupational plaintiffs[4] based their claims upon West Virginia workers' compensation law, seeking damages for occupational exposure to chemicals under *W. Va. Code* § 23-4-2, the "deliberate intention" exception to the immunity afforded Joy under § 23-2-6 of the West Virginia Workers' Compensation Act. The only *negligence* claim pled for an occupational plaintiff was for "non-occupational exposure" because Joy "negligently and/or recklessly encouraged and allowed its employees to take PCB oil and PCB contaminated material home with them . . . " The only direct claim – as opposed to a derivative claim for loss of consortium – made by a non-employee was that of Geneva Thompson who alleged exposure to chemicals brought home on her husband's clothing, person, tools and lunchbox.

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[2] 755 F. Supp. 1373.

[3] *Petition for Certiorari* at p. 2.

[4] Three civil actions, *Rodney D. Ball, et al. v. Joy Mfg. Co.*, *Geneva Thompson, et al. v. Joy Technologies Inc.*, and *Levitt v. Joy Technologies Inc.*, were consolidated by the District Court in an order dated August 10, 1989. Eighteen plaintiffs are present or former employees of Joy Technologies Inc., and two plaintiffs are spouses.

After three years of discovery, in response to Joy's summary judgment motion, the plaintiffs changed their legal theory, claiming that their "injury" was the mere exposure to chemicals and not any physical manifestation resulting from the exposure.[5] From this "injury," the plaintiffs claimed damages for emotional distress (for which they had no medical testimony[6]) and the cost of future medical testing allegedly necessitated by the exposure. Until their response to Joy's motion for summary judgment, the plaintiffs never claimed that West Virginia workers' compensation law did not apply. They changed their theory only in response to Joy's position in its motion for summary judgment that plaintiffs could not satisfy the stringent requirements of the claims which they had pled under *W. Va. Code* § 23-4-2.

The plaintiffs' current portrayal of their damage claims is similarly misleading. Their complaints expressly sought damages for *present* physical injuries, alleging that they had "physical and mental injuries, past, present and future" as a result of exposure to chemicals. They abandoned these claims after Joy sought an order requiring physical and mental examinations pursuant to Fed. R. Civ. P. 35. Indeed, plaintiffs admitted at oral argument on the motion for summary judgment that they did not claim any manifestation, symptom, or injury caused by their exposure.[7] In similar fashion, they abandoned their claims for increased risk of future disease by failing to contest Joy's motion for summary judgment.[8]

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[5] 755 F. Supp. at 1349.

[6] 755 F. Supp. at 1370.

[7] 755 F. Supp. at 1349.

[8] 755 F. Supp. at 1348.

Thus, contrary to the current portrayal of their claims in this Court, the plaintiffs pled factual claims and legal theories in the district court which were strategically abandoned both to avoid discovery and summary judgment.

The district court verbally notified the parties on August 6, 1990, that it was granting Joy's motion for summary judgment; suddenly, the plaintiffs, who had never sought, and had even refused, certification, filed a motion making such a request. The district court denied the motion as *"untimely."*[9]

The district court granted summary judgment for the defendant because the plaintiffs lacked physical injury which is required under West Virginia and Virginia law to support their claims.[10] The United States Court of Appeals for the Fourth Circuit affirmed the grant of summary judgment in an unpublished opinion.

V. SUMMARY OF ARGUMENT

Established West Virginia and Virginia precedent requires physical injury to support claims of negligent infliction of emotional distress and future medical

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[9] The United States Court of Appeals for the Fourth Circuit also denied a motion for certification made by the plaintiffs.

[10] Prior to 1978, the occupational plaintiffs were employed at the defendant's Bluefield, West Virginia, facility. In 1978, the defendant's operation was moved to Bluefield, Virginia.

expenses. The plaintiffs admitted that they had no physical injury and claimed that the mere exposure to chemicals was their only injury. The district court properly applied West Virginia and Virginia law in granting defendant's motion for summary judgment, and the fourth circuit correctly affirmed that judgment.

Both the district court and the circuit court properly refused to reject established and controlling state court precedent. Contrary to plaintiffs' assertion, this case does not present a novel issue of state law.

The plaintiffs' implication that they were somehow disadvantaged by being in a federal forum in this action is misleading. The plaintiffs chose to file this action in federal court. Moreover, prior to the district court's ruling on summary judgment, the plaintiffs resisted certification of questions to the Supreme Court of Appeals of West Virginia. Having actively sought a federal court determination of their claim, the plaintiffs should not now be heard to say that the standard for determining state law applied in the federal court creates an unfair opportunity for defendants to "forum shop" in removing cases to federal court.

Finally, the asserted issue regarding the standard for determining state law questions was not raised by the plaintiffs below and is not properly presented for review by this Court.

———♦———

VI. ARGUMENT

A. The Plaintiffs' Lack of Physical Injury Mandated Summary Judgment for the Defendant Under West Virginia and Virginia Law Which Require Physical Injury to Support Claims for Emotional Distress and Future Medical Expenses.

The plaintiffs attempt to characterize this case as presenting a novel question of state law. The plaintiffs ignore, however, well established Virginia and West Virginia precedent which require physical injury to support the plaintiffs' claims.

With the exception of intentional infliction of emotional distress, damages for emotional distress may not be recovered under West Virginia or Virginia law absent a finding of physical injury. *Monteleone v. Co-Operative Transit Co.*, 128 W. Va. 340, 36 S.E.2d 475, 478 (1945); *Hughes v. Moore*, 214 Va. 27, 197 S.E.2d 214, 219 (1973). The plaintiffs' mere exposure to chemicals does not provide the requisite physical injury to entitle the plaintiffs to recover for alleged emotional distress. *See, e.g., Locke v. Johns-Manville Corp.*, 221 Va. 951, 275 S.E.2d 900 (1981); *Pauley v. Combustion Engineering, Inc.*, 528 F. Supp. 759 (S.D.W. Va. 1981) (applying West Virginia law). The district court and the fourth circuit both therefore properly concluded that the plaintiffs could not recover for alleged emotional distress absent physical injury.

The Supreme Court of Appeals of West Virginia's recent decision in *Johnson v. West Virginia University Hospitals, Inc.*, 1991 WL 245575 (W. Va., Nov. 21, 1991), demonstrates that mere exposure to chemicals cannot support a claim for emotional distress without physical injury. In

Johnson, the plaintiff, a hospital security guard, was bitten by a patient suffering from Acquired Immune Deficiency Syndrome (AIDS). Johnson, an employee of West Virginia Security Police, sought damages for emotional distress from the defendant West Virginia University Hospitals, Inc., alleging that it negligently failed to warn him of the patient's infection. In affirming a jury award for the plaintiff, the West Virginia court reiterated the requirement of physical injury. The court stated:

> As a general rule, absent physical injury, there is no allowable recovery for negligent infliction of emotional distress. [cite omitted]. The Court has recognized this traditional principle: "There can be no recovery in tort for an emotional and mental trouble alone without ascertainable physical injuries arising [from] . . . the simple negligence of the defendant." Syl., in part, *Monteleone v. Co-Operative Transit Co.*, 128 W. Va., 340, 36 S.E.2d 475 (1945).

Johnson at 5.

The court thus held that:

> . . . damages for emotional distress may be recovered by a plaintiff against a hospital based upon the plaintiff's fear of contracting Acquired Immune Deficiency Syndrome (AIDS) if: the plaintiff is not an employee of the hospital[11] but

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[11] If Johnson had been an employee of the defendant his claim would have been barred by workers' compensation immunity under W. Va. Code § 23-2-6. See *Johnson* at fn. 8. Likewise, in the present action, if the occupational plaintiffs were found to have actually incurred an injury, which they did not, their only remedy against Joy, their employer, would be through workers' compensation, and their action would be barred under workers' compensation immunity.

> has a duty to assist hospital personnel in dealing with a patient infected with AIDS; the plaintiff's fear is reasonable; *the AIDS infected patient physically injures the plaintiff and such physical injury causes the plaintiff to be exposed to AIDS;* and the hospital has failed to follow a regulation which requires it to warn the plaintiff of the fact that the patient has AIDS despite the elapse of sufficient time to warn.

Johnson at 10 (emphasis added). The court concluded that Johnson fulfilled the physical injury requirement because the bite was a physical injury and the bite lead directly to his exposure.

The court in *Johnson* emphasized the limited nature of its holding:

> We emphasize that our decision herein is not to permit recovery of emotional distress damages to anyone who comes into contact with a person who is infected with AIDS or merely believes that a person is infected with AIDS. Rather, as stated above, recovery of such damages is limited to the situation where the plaintiff is actually exposed to the AIDS virus *as a result of a physical injury,* and emotional distress, along with physical manifestations of such distress, result therefrom.

Johnson at 10 (emphasis added).

Just as mere exposure to the AIDS virus without physical injury is insufficient under *Johnson* to support a cause of action for emotional distress, mere exposure to chemicals is insufficient to support the plaintiffs' claims in this action. *See Rittenhouse v. St. Regis Hotel Joint Venture,* 149 Misc. 2d 452, 565 N.Y.S.2d 365 (1990) (fear of

cancer from exposure to asbestos *without any physical indication of disease* does not lead to recovery for emotional distress damages) (cited in *Johnson*).

Numerous other jurisdictions have also concluded that mere exposure to chemicals without physical injury cannot support a claim for emotional distress. *See, e.g., Adams v. Johns-Manville Sales Corp.*, 783 F.2d 589, 593 (5th Cir. 1986) (rejecting plaintiff's claims for mental distress damages under Louisiana law because he failed to establish that he sustained an injury from his exposure to asbestos products); *Plummer v. Abbott Laboratories*, 568 F. Supp. 920 (D.R.I. 1983) (plaintiff's ingestion of diethylstilbestrol did not *per se* constitute a physical injury under Rhode Island law); *Sypert v. United States*, 559 F. Supp. 546 (D.D.C. 1983) (plaintiff suffered no physical injury from exposure to tubercle bacilli, and could not recover mental distress damages under Virginia law); *Eagle-Picher Industries, Inc. v. Cox*, 481 So. 2d 517 (Fla. Dist. Ct. App. 1985) (Florida law does not recognize inhalation of asbestos as physical injury); *Payton v. Abbott Labs*, 386 Mass. 540, 437 N.E.2d 171 (Mass. 1982) (plaintiff's in utero exposure to diethylstilbestrol was not a physical injury or harm under Massachusetts law).

The plaintiffs assert that because the Supreme Court of Appeals of West Virginia has a reputation as a liberal progressive court, it might reverse the *Monteleone* requirement of physical injury. This speculation is completely foreclosed by the court's reaffirmation of *Monteleone* and the physical injury requirement in *Johnson, supra*.

The district court and the fourth circuit also correctly rejected plaintiffs' claims for medical surveillance costs.

Under both West Virginia and Virginia law, such a claim for future medical expenses is only available where a plaintiff has sustained a physical injury proximately caused by the defendant. *Jordan v. Bero*, 158 W. Va. 28, 210 S.E.2d 618, 637 (1974); *Hailes v. Gonzales*, 207 Va. 612, 151 S.E.2d 388, 390 (1966). Plaintiffs' lack of present physical injury therefore required summary judgment on the medical surveillance claim under established West Virginia and Virginia law.

B. The Fourth Circuit Properly Applied Established State Law in Affirming the District Court's Order Granting Summary Judgment.

The plaintiffs now attempt to assert that there is conflict among the federal circuits regarding the proper resolution of novel issues of state law, and that this court should therefore review the fourth circuit's holding in this action. Plaintiffs' argument fails in numerous respects. Most importantly, this is not a case which turns on a novel issue of state law. As demonstrated above, both the district court's and the fourth circuit's opinions are well-founded in established West Virginia and Virginia precedent. Both the district court and the fourth circuit applied presently existing state law and refused to surmise that the West Virginia Supreme Court of Appeals would overrule established precedent. *See* 755 F. Supp. at 1372. This case therefore does not raise any question regarding novel issues of state law, particularly in light of the *Johnson* decision, *supra*.

Additionally, contrary to plaintiffs' assertion, there is no conflict between the ninth circuit's decision in *Paul v.*

Watchtower Bible and Tract Soc. of New York, Inc., 819 F.2d 875, 879 (9th Cir.), *cert. denied*, 484 U.S. 926 (1987), and the fourth circuit's decision below. The fourth circuit stated that "the Erie doctrine permits federal courts 'to rule upon state law as it presently exists and not to surmise or suggest its expansion.' *Washington v. Union Carbide Corp.*, 870 F.2d 957, 962 (4th Cir. 1989)." App. at 6-7. Because the law of West Virginia and Virginia requires physical injury before a plaintiff may recover damages for emotional distress, the district court and the fourth circuit correctly concluded that the plaintiffs' exposure to chemicals did not constitute an injury that would entitle them to recover damages for emotional distress. *Id.* The fourth circuit simply refused to create out of the whole cloth a new cause of action which did not require physical injury, in light of the established West Virginia and Virginia case law requiring physical injury.

The fourth circuit's refusal to reject established state law precedent is not inconsistent with the ninth circuit's holding in *Paul*. *Paul* indicates that in an appropriate circumstance a federal court may afford relief even though the state court has not yet clearly enunciated a rule providing for such relief. *Paul* does not stand for the proposition that a federal court may substitute its own judgment for state law and reject established state court precedent.

It is significant to note that neither the fourth circuit nor the district court found a reasonable basis to suggest that the state courts of West Virginia or Virginia would allow recovery in this action. As stated by the district court:

> . . . this Court must apply the presently existing law of these states and not suggest or surmise its expansion. Where such law is unclear or unsettled, this Court must faithfully make an informed prediction as to how those States' highest courts would rule if the case were before them and may not do so according to its own sense of what the law should be. *See Kline v. Wheels By Kinney, Inc.*, 464 F.2d 184, 187 (4th Cir. 1972).
>
> In light of the presently existing law of these States, this court cannot reasonably and faithfully predict that their highest courts would recognize the Plaintiffs' claims to recover the costs of future medical monitoring where these plaintiffs have not suffered an actionable injury under such law.

755 F. Supp. at 1372.

Thus, even following *Paul's* suggestion that a federal court may provide relief without clearly established state precedent, there is absolutely no basis to conclude West Virginia or Virginia would allow the plaintiffs to recover without physical injury. This conclusion is especially true in light of the recent *Johnson* decision.

The problem suggested by the ninth circuit in *Paul* regarding the removal of claims involving novel issues is not raised by the fourth circuit's decision in *Ball v. Joy Manufacturing*. The ninth circuit stated in *Paul* that:

> a policy by the federal court never to advance beyond existing state court precedent would vest in defendants the power to bar the successful adjudication of plaintiffs' claims in cases with novel issues; defendants could ensure a

> decision in their favor simply by removing the case to federal court.

819 F.2d at 879. The fourth circuit's decision in *Ball v. Joy Manufacturing* creates no such policy. The fourth circuit simply held that the Erie Doctrine permits federal courts to rule upon state law as it presently exists, and that the state law of West Virginia and Virginia required the rejection of the plaintiffs' claims.

It is significant to note that the plaintiffs in their attempt to concoct a conflict between the circuits in their petition do not quote from the fourth circuit's opinion in *Ball v. Joy Manufacturing*. Rather, the plaintiffs quote from the fourth circuit's *per curiam* opinion in *Tritle v. Crown Airways, Inc.*, 928 F.2d 81 (4th Cir. 1990). The fourth circuit, in its opinion in *Ball*, does not even refer to the *Tritle* opinion. Any alleged conflict between the fourth circuit's position in *Tritle*, and the ninth circuit's position in *Paul* obviously does not justify the review of the fourth circuit's decision in this action which does not even rely upon *Tritle*. Moreover, *Tritle* does not create a policy to never advance beyond existing state court precedent and is therefore reconcilable with *Paul*.

Plaintiffs' contention that the fourth circuit's holdings in *Washington* and *Tritle* provide defendants with an unfair weapon in removing claims involving novel issues to federal court is misleading. This action was not removed to federal court; the plaintiffs chose to file this action originally in federal court. Moreover, the plaintiffs rejected the suggestion made by the district court prior to ruling on the motion for summary judgment that the question could be certified to the West Virginia Supreme

Court of Appeals, and only sought to certify questions to the West Virginia Supreme Court of Appeals after the district court resolved the motion for summary judgment against the plaintiffs. The plaintiffs having sought a federal determination of their claim cannot now complain of the federal court's refusal to reject established state law. Certainly, given the fact that this case was never removed, it is not the appropriate case to resolve any issue regarding the determination of state law in removed actions.

C. Plaintiffs Failed to Raise Below the Issue Upon Which They Now Seek Review.

The plaintiffs made no issue in the court below regarding the standard stated by the fourth circuit in *Washington* and *Tritle, supra.*[12] In fact, the plaintiffs did not refer to *Washington* or *Tritle* in their brief to the fourth circuit. Nor did the plaintiffs rely upon or refer to *Paul, supra,* in their brief to the fourth circuit. Moreover, the plaintiffs made no request for an *en banc* hearing before the fourth circuit to seek review of the issue they now attempt to raise. Any issue regarding the correctness of *Washington* or *Tritle* simply was not raised below, and should not be reviewed by this Court:

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[12] The plaintiffs did raise an issue in the fourth circuit regarding whether the circuit court should give substantial deference to the district court's determination of state law. This issue was resolved by this Court's decision in *Salve Regina College v. Russel,* 111 S. Ct. 1217 (1991), prior to the fourth circuit's decision in this action.

> Ordinarily, this Court does not decide questions not raised or resolved in the lower court. . . . It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.

Youakim v. Miller, 425 U.S. 231, 234 (1976) (internal quotations and citations omitted). There is nothing exceptional about this case which requires review by this Court.

VII. CONCLUSION

Plaintiffs admitted they had no physical injury. West Virginia and Virginia law require physical injury to support the plaintiffs' claims. Given the absence of the required physical injury, the district court properly granted summary judgment and the fourth circuit properly affirmed that judgment. There simply is no significant issue presented in this action which requires review by this Court. Plaintiffs' petition for a writ of certiorari should therefore be denied.

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